INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and contract involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	12
Appendix A	13
Appendix B	18

CITATIONS

Cases:

Edwards v. *Capital Airlines*, 176 F. 2d 755	6
Fishgold v. *Sullivan Drydock Corp.*, 328 U. S. 275	10, 11
National Labor Relations Board v. *Waterman S. S. Co.*, 309 U. S. 206	10

Statutes:

Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U. S. C. App. 308:	
Section 8	2, 6
Section 8(a)	13
Section 8(b)	2, 6, 13
Section 8(c)	14
Section 8(d)	15
Section 8(e)	3, 15
Section 8(f)	16
Section 8(g)	17
Section 8(h)	17
Section 8(i)	17
Selective Service Act of 1948, Sec. 9, 62 Stat. 604, 614	6

Miscellaneous:

Collective Bargaining Provisions, Seniority (1949), Bureau of Labor Statistics, Department of Labor Bulletin 908-11	10
Federal Rules of Civil Procedure, Rule 56	7
Union Agreement Provisions, Bureau of Labor Statistics, Department of Labor, H. Doc. No. 723, 77th Cong., 2d Sess.	10

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 405

ROBERT L. BARBEE, PETITIONER

v.

CAPITAL AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Robert L. Barbee, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case on August 2, 1951.

OPINIONS BELOW

The summary judgment of the District Court for the District of Columbia (R. 23) was not accompanied by an opinion. The opinion of the Court of Appeals (R. 25-30) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1951 (R. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a veteran who entered the armed forces at a time when he was laid off or furloughed due to a reduction in force is entitled to reemployment benefits under the Selective Training and Service Act of 1940, as amended, where the applicable collective bargaining agreement provides that employees thus laid off shall be restored to employment in order of seniority and with the seniority which they had at the time of lay-off.

STATUTE AND CONTRACT INVOLVED

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S.C. App. 308, is set forth in full, *infra,* Appendix A. The immediately pertinent provisions of Section 8(b) are as follows:

> In the case of any person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer * * *
>
> * * * * *
>
> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * * *

The pertinent provisions of the collective bargaining agreement between respondent and the Airline Pilots' Association are set forth, *infra*, Appendix B.

STATEMENT

This is an action to enforce a veteran's reemployment rights under Section 8 of the Selective Training and Service Act of 1940, as amended.[1] Petitioner was first employed as a probationary copilot by the respondent Capital Airlines, Inc., on July 15, 1946. On January 6, 1947, petitioner was laid off or furloughed from his employment (R. 8, 16) in accordance with the respondent's letter of January 2, 1947, addressed to the petitioner, advising him as follows (R. 21):

> It is with regret that I must inform you that due to your position on the seniority system of the company, it is necessary to place you on furlough until further notice. This furlough will take effect as of January 6, 1947. * * * I take this action with great reluctance and hope that you will keep in touch with us so that you may be put back on our payrolls as soon as business permits.

On March 19, about 10 weeks later, and while petitioner was still idle, he entered the United States Air Force (R. 16). Petitioner was discharged from the Air Force on February 6, 1950, and re-

[1] In accordance with the provisions of Section 8(e) of the Act, set forth in Appendix A, petitioner was represented in the courts below by the United States Attorney for the District of Columbia.

quested the respondent to reinstate him in his former position. Upon respondent's refusal to reinstate him, petitioner brought this action. For relief, petitioner sought a judgment requiring respondent to reinstate him in his former position with the same relative position on the seniority roster which he held at the time of his entry into military service, and awarding him back pay from the date of his application for reinstatement. (R. 12.)

The respondent conceded (R. 8, 19) and the District Judge found (R. 16) that petitioner was "released" due to a reduction in respondent's working force in accordance with Section 27(a) of the collective bargaining agreement between respondent and its pilot employees. At all relevant times, Section 27(a) (R. 11)[2] provided that:

> A pilot who is released from the service of the Company due to reduction in force and who is subsequently reemployed shall retain his seniority to the time of release but shall not continue to accrue seniority after release unless and until he is reemployed. Such pilot, if he keeps the Company advised of his address, will be reemployed in the order of his seniority, provided the Company finds his flying ability and physical condition still meet the required standards. The right of preference in reem-

[2] The findings of fact and the arguments of both parties referred to Section 27(a) of the agreement as alone controlling. However, Section 18(b) (*infra*, pp. 18-19) is also pertinent in that it enumerates the incidents of the employment which are governed by seniority.

> ployment shall expire at the end of one year from the date of release.

While petitioner was serving in the Air Force, the respondent twice called him back to work (R. 21), presumably in accordance with his seniority. The first recall occurred in May 1947, about five months after his lay-off and well within the one year specified in Section 27(a) of the collective bargaining agreement, and the second in May 1948 (R. 21).

So much appeared from the pleadings and affidavits, and upon that basis the district court, after denying petitioner's motion for a temporary injunction (R. 15-16), granted summary judgment for the respondent (R. 23). On appeal, the court below held, with Judge Washington dissenting, (1) that petitioner had been "permanently released" from respondent's service before he was recalled to the Air Force, and (2) "that the status of a pilot released due to a reduction in force under Section 27(a) of the collective bargaining agreement is one of unemployment," and that upon either basis, therefore, petitioner did not leave a position of employment in order to perform military service and was not entitled to be reinstated as a copilot in respondent's service (R. 28-29).[3] Accordingly, it affirmed the judgment.

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[3] Respondent also contended in the court below that petitioner, having been hired in a one-year probationary status in July, 1946, was only a temporary employee not entitled to the benefits of the Act. The court made no reference in its opinion to this contention, and we believe that it is clearly

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether Section 8 of the Selective Training and Service Act of 1940 accords reemployment rights to veterans who entered the armed services at a time when they were laid off or furloughed, due to a reduction in force, pursuant to a collective bargaining agreement providing that both lay-offs and reemployment (with restoration of seniority accrued to the date of lay-off) should be governed by seniority. Such seniority provisions appear in a large number of collective bargaining agreements. The question has great future importance in that it appears that many persons will be inducted into the armed forces while they are furloughed from their employment because of temporary reductions in force incident to retooling for rearmament. Section 9 of the Selective Service Act of 1948[4] prescribes substantially the same reemployment rights for veterans as does Section 8 of the 1940 Act.

1. The initial conclusion of the court below that petitioner was permanently discharged from the respondent's service, as had been the plaintiffs in *Edwards and Young* v. *Capital Airlines, Inc.*, 176 F. 2d 755 (C.A. D.C.), is obviously erroneous.

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incorrect, since the seniority provisions of the collective bargaining agreement are applicable to probationary copilots. Also, it is our view that a probationary employee is not included in the class of temporary employees who are denied reemployment rights by Section 8(b) of the Act.

[4] 62 Stat. 604, 614.

As Judge Washington, dissenting, pointed out (R. 30), Edwards and Young were in fact permanently discharged from the respondent's service, while the petitioner was told that he was being furloughed in accordance with seniority and was in fact offered reemployment in accordance with seniority (*supra*, p. 5). The respondent has conceded (R. 19) and the district court found (R. 16) that petitioner was released in accordance with Section 27(a) of the collective bargaining agreement. Indeed, the court below stated that, "There is no dispute that the [petitioner] was released or furloughed pursuant to Section 27(a) of the collective bargaining agreement in the instant case" (R. 28). Under these circumstances, we believe that the indispensable basis of the decision below was the conclusion of the Court of Appeals that an employee who enters the armed services at a time when he is laid off or furloughed pursuant to Section 27(a) lacks a position of *employment* to which he is to be restored in accordance with Section 8 of the Act.[5]

2. Accordingly, the core of the decision is that since an employee furloughed or laid off pursuant to Section 27(a) is not at that point performing

[5] Our conclusion as to the essential basis of the decision below is confirmed by the fact that if that decision was based upon a resolution of the disputed factual issue of whether the petitioner was "discharged" or "furloughed", then the disposition of that issue by granting a motion for summary judgment was clearly erroneous. Rule 56, Federal Rules of Civil Procedure.

work for the employer and being paid by the employer, such an employee is unemployed; and, if he is thus unemployed when he enters the armed forces, he does not have a position of employment to which he must be restored under Section 8 of the Act. This result ignores the fact that, under a large number of collective bargaining agreements, seniority provisions governing layoff and reemployment in connection with temporary reductions in force confer upon furloughed employees an expectation of being put back to work in accordance with their seniority rights. We contend that such a contractual right and expectation of restoration to employment constitutes a continuing relationship between the furloughed employee and his employer which is protected by Section 8 of the Selective Training and Service Act. Specifically, we urge that under Section 8 petitioner is entitled to be reinstated in the position of copilot to which he would have been restored in accordance with Section 27(a) of the agreement if he had not entered the armed forces.

Section 18(b) of the instant collective bargaining agreement typically provides (R. 10) that:

> Seniority shall govern all pilots in case of promotion and demotion, their choice of vacancies, filling of vacancies, their assignment or reassignment due to expansion or reduction in schedules, their retention in case of reduction in force, their reemployment after

> release due to reduction in force provided that the pilot's qualifications are sufficient for the operation to which he is to be assigned. * * *

Section 27(a) provides that a pilot who is released due to reduction in force and who is later reemployed shall retain the seniority which he has accrued to the time of his release; it further provides that such a pilot "will be reemployed in the order of his seniority," but that, "The right of prefe. nce in reemployment shall expire at the end of one year from the date of release." Thus, an employee released or furloughed in accordance with Section 27(a) retains for one year (1) a right to preference in reemployment in accordance with seniority, and (2) a right when reemployed to retain the seniority which he had accrued at the time of his release, with its valuable incidents under Section 18(b) of the agreement.

Similar provisions are found in many collective bargaining agreements, with variations as to the extent to which seniority accrues during layoff and as to the duration of the right of preference in reemployment. For example, the current agreement between General Motors Corporation and the United Automobile, Aircraft & Agricultura. Implement Workers of America—CIO provides that "Employees will be laid off and rehired in accordance with local seniority agreements"; under this agreement a laid-off employee retains his seniority

for a period equal to the seniority which he had acquired at the time of such lay-off".

Clearly, this preferential right to reemployment in accordance with seniority, together with the companion provision for reduction in force according to seniority, is a most important aspect of the seniority system. It creates between the furloughed employee and his employer a relationship, in terms of an expectation of reemployment, which must be regarded as a "position * * * in the employ" of such employer so as to effectuate the statutory purpose "to protect the veteran's rights under [seniority] systems and to protect him against loss under them by reason of his absence." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 288.[7]

The practical consequences of the decision below are persuasive that it is erroneous. Every year, many thousands of employees covered by such seniority provisions are laid off or furloughed in reduction in force caused by seasonal or other fluctuations in business, retooling, lack of materials, damage to plant from fire or flood, taking

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[6] See, generally, *Union Agreement Provisions*, Bureau of Labor Statistics, Department of Labor, H. Doc. No. 723, 77th Cong., 2d Sess., chs. 8, 14; *Collective Bargaining Provisions, Seniority* (1949), Bureau of Labor Statistics, Department of Labor Bulletin 908-11, pp. 50-57.

[7] These express contractual rights present no such difficulties of ascertainment as were involved in the "continuing right to and customary tenure, term or condition of employment" which was protected in *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206, 213.

inventory, and similar circumstances interrupting the employer's operations. Inevitably, many of such employees will be inducted into the armed forces at a time when they are thus laid off or furloughed. The result of the decision below is that no veteran who has entered or enters the armed forces under these circumstances will be entitled to be restored to his employment in accordance with Section 8 of the Act.

The decision below is also in square conflict with the rationale of this Court in *Fishgold* v. *Sullivan Drydock & Repair*, 328 U.S. 275. In that case it was held that veterans restored to their positions properly may be laid off when a work shortage requires it, in accordance with a seniority system, and that such a veteran was not "discharged from his position" within the meaning of Section 8 of the Act. In arriving at this conclusion, the Court made the following distinction between "discharge", and "furlough" or "layoff" (328 U.S. at 286-288):

> Discharge normally means termination of the employment relationship or loss of a position. In common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered as having been "discharged." * * * A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from

> unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. * * * An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions. * * *
>
> The "position" to which the veteran is restored is the "position" which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his "position" when he was inducted. * * *

The decision below, therefore, is clearly inconsistent with this Court's opinion in *Fishgold*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1951.

APPENDIX A

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S.C. App. 308, reads as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this Act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department: *Provided,* That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of the Navy would prove injurious to the physical or mental health of the person to whom it pertains.
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any em-

ployer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so

restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(d) Section 3 (c) of the joint resolution entitled "Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service", approved August 27, 1940, is amended to read as follows:

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

(e) In case any private employer fails or refuses to comply with the provisions of sub-

section (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits.

(f) Section 3 (d) of the joint resolution entitled "Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service",

approved August 27, 1940, is amended by inserting before the period at the end of the first sentence the following: ", and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action".

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this Act.

(h) Any person inducted into the land or naval forces for training and service under this Act shall, during the period of such training and service, be permitted to vote in person or by absentee ballot in any general, special or primary election occurring in the State of which he is a resident, whether he is within or outside of such State at the time of such election, if under the laws of such State he is entitled so to vote in such election; but nothing in this subsection shall be construed to require granting to any such person a leave of absence for longer than one day in order to permit him to vote in person in any such election.

(i) It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the

United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund.

APPENDIX B

The pertinent provisions of the collective bargaining agreement between respondent and the Airline Pilots' Association are as follows (R. 9-12):

Sec. 2. As used in this agreement:

(a) "Pilot" shall include and mean first pilot, reserve pilot and copilots as defined herein:

* * * * *

Sec. 18. (a) Seniority of a pilot shall be based upon the length of service as a regularly scheduled air line pilot in the employ of the Company or its predecessor airline Companies whose operations have been taken over by the Company. Seniority grievance cases which are now pending or may become pending when a master seniority list is posted as provided herein, shall be decided by the Seniority Adjustment Board established in this agreement, the decision of which shall be final and binding on all parties hereto.

(b) Seniority shall govern all pilots in case of promotion and demotion, their choice of vacancies, filling of vacancies, their assignment or reassignment due to expansion or

reduction in schedules, their retention in case of reduction in force, their reemployment after release due to reduction in force provided that the pilot's qualifications are sufficient for the operation to which he is to be assigned. In the event that a pilot is considered by the Company not to be sufficiently qualified, the Company shall immediately furnish such pilot written reasons therefor.

(c) Seniority as a pilot shall begin to accrue on the date of assignment to air line flying duty as a pilot, and shall continue to accrue throughout the period of such duty except as otherwise provided in this agreement.

* * * * *

Sec. 20. Copilots may be on probation for a period not to exceed the first twelve months of their service as a copilot with the Company. * * *

* * * * *

Sec. 27. (a) A pilot who is released from the service of the Company due to reduction in force and who is subsequently reemployed shall retain his seniority to the time of release but shall not continue to accrue seniority after release unless and until he is reemployed. Such pilot, if he keeps the Company advised of his address, will be reemployed in the order of his seniority, provided the Company finds his flying ability and physical condition still meet the required standards. The right of preference in reemployment shall expire at the end of one year from the date of release.

(b) A pilot who has been released due to reduction of force shall file his address with the Company and shall thereafter promptly advise the Company of any change in address and shall renew his statement of address, whether changed or not, each ninety days.

(c) A pilot shall not be entitled to preference in reemployment if he does not comply with the foregoing requirement or if he does not return to the service of the Company within two weeks after notice to do so, sent by registered mail or telegram to the last address filed with the Company.

Sec. 28.

A. Hearing. 1. A pilot shall not be disciplined or dismissed from the Company without notification in writing from the Company as to any such action and such pilot shall not be disciplined or dismissed without an investigation and hearing provided that the pilot makes written request for an investigation and hearing within twelve days after receiving such written notification. Nothing herein shall extend the right of investigation and hearing to a copilot on probationary status.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 973972 377

Office Supreme Court, U. S.
FILED
DEC 7

No. 405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

ROBERT L. BARBEE, *Petitioner,*

v.

CAPITAL AIRLINES, INC., *Respondent.*

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute and Contract Involved	2
Statement	2
Reasons for the Denial of the Petition for Certiorari	5
A. The Case is Limited to Its Particular Facts. It Does Not Present an Important Question of General Application	5
B. The Decision Below Is Not in Conflict With Any Decision of this Court	9
Conclusion	11

TABLE OF AUTHORITIES.

CASES:

Aeronautical Lodge v. *Campbell*, 337 U. S. 521, 69 S. Ct. 1287, 93 L. Ed. 1513 9

Edwards and Young v. *Capital Airlines, Inc.*, 84 App. D. C. 346, 176 F. 2d 755, cert. denied 338 U. S. 885, 70 S. Ct. 186, 94 L. Ed. 543 ..... 4, 6, 10

Fishgold v. *Sullivan Drydock & Repair*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230 ..... 2, 10

STATUTES:

Selective Training and Service Act of 1940, 50 U. S. C. App. § 308, 54 Stat. 890 ..... 3, 4, 5, 6, 7, 9, 10

28 U. S. C. § 1254 (1) 2